The Fund for The Public Interest *and* Communications Workers of America, Local 7901, AFL–CIO. Case 19–CA–094311

May 13, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON, AND SCHIFFER

On October 25, 2013, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

In affirming the judge's finding that Neel's postdischarge statements about the Respondent to the *Portland Mercury* do not affect his eligibility for reinstatement and backpay, we note that under the applicable standard, the Respondent must prove "'misconduct so flagrant as to render [Neel] unfit for further service, or a threat to efficiency in the plant.'" *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 3 (2011) (quoting *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 405 (1969)). Under this standard, the Board has characterized the denial of reinstatement as warranted only in "extraordinary situation[s]." *Timet*, 251 NLRB 1180, 1180–1181 (1980), enfd. 671 F.2d 973 (6th Cir. 1982). Such extraordinary situations have been found to exist where the discriminatee threatened to kill someone, *Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 520-521 (2000); *Precision Window Mfg. v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992); *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992); intentionally struck a supervisor with an automobile, *Hillside Ave. Pharmacy, Inc.*, 265 NLRB 1613 (1982); and threatened to report a probation violation in order to influence a witness's testimony during a Board hearing, *Lear-Siegler Management Service*, 306 NLRB 393, 394 (1992). On the other hand, in addition to the cases cited by the judge involving disparaging statements, the Board has granted a full remedy despite an attempted assault of a supervisor, *Casa San Miguel, Inc.*, 320 NLRB 534, 534 fn. 2 (1995), and the utterance of an ethnic slur unaccompanied by threats or violence, *C-Town*, 281 NLRB 458 (1986). In line with these cases, among others, Neel's postdischarge statements to the *Portland Mercury* that he no longer believed in what the Respondent does and comparing the Respondent's business to a Ponzi scheme do not present an "extraordinary situation" warranting denial of backpay or reinstatement.[4]

ORDER

The National Labor Relations Board orders that the Respondent, The Fund for the Public Interest, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for activities in support of the Communications Workers of America, Local 7901, AFL–CIO or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Neel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent posi-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that employee David Neel was unlawfully discharged, we place particular emphasis on language in an email sent from Portland Telephone Outreach Program (TOP) Director Referd Raley to National TOP Director Pat Wood on November 6, 2012, the day of Neel's discharge. Raley wrote: "One of the best staff management decisions I have ever made . . . . [Neel] has union stuff and a pillow at the office. . . . [The Union] will claim some or all of the following: retaliation for [Neel]'s union leadership, retaliation for the OSHA complaint, inconsistent enforcement of the integrity policy . . . . We should also expect some other made up s— to start getting thrown against the wall, as is the pattern of behavior whenever union leadership is held accountable to [sic] their actions." Raley admits here that he made the decision to discharge Neel, and his statements about the Union and Neel's leadership position therein constitute direct evidence of antiunion animus.

[2] The General Counsel requests that the Board strike and disregard certain portions of the Respondent's exceptions brief on the grounds that those portions of the brief incorporate facts not in evidence in support of the Respondent's arguments. We grant the request.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). For the reasons stated by the judge, we adopt her finding that Neel's prior convictions do not disqualify him from reinstatement and backpay.

[4] Neel disavowed these views at the hearing.

tion, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Neel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate David Neel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of David Neel, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Portland, Oregon facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 13, 2014

Philip A. Miscimarra,	Member
Harry I. Johnson, III,	Member
Nancy Schiffer,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in activities in support of the Communications Workers of America, Local 7901, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer David Neel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make David Neel whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate David Neel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of David Neel, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

THE FUND FOR THE PUBLIC INTEREST

The Board's decision can be found at www.nlrb.gov/case/19-CA-094311 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Helen Fiorianti, Esq. and *Rachel Harvey, Esq.,* for the General Counsel.
Brent Jordheim, Esq., of Denver, Colorado, for the Respondent.
Madelyn Elder, of Portland, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Portland, Oregon, on August 6 and 7, 2013. The Communications Workers of America, Local 7901, AFL–CIO (Union) filed the original charge on December 6, 2012[1] and an amended charge on January 29, 2013. The General Counsel issued the complaint on February 27, 2013.

The complaint alleges that on or about November 6, 2012, The Fund for the Public Interest (Respondent) terminated its employee, David Neel (Neel) because he engaged in concerted protected activities on November 2, 2012.

[1] All dates are in 2012 unless otherwise indicated.

I. FINDINGS OF FACT

Respondent, a Massachusetts corporation, with an office and place of business in Portland, Oregon, has been engaged in providing citizen outreach services for non-profit organizations. During the fiscal year ending June 30, 2012, Respondent derived gross revenues in excess of $10,000 and performed services valued in excess of $50,000 in States other than the State of Oregon. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

In its answer filed on March 12, 2013, Respondent denies knowledge or information sufficient to form a belief as to the status of the Union as a labor organization within the meaning of Section 2(5) of the Act. Union President Madelyn Elder (Elder) testified that the business of the Union is to negotiate and enforce collective-bargaining agreements (contracts) and to represent employees in grievance proceedings. As union president, Elder oversees the Union's organizing, as well as, the grievance processing and contract enforcement. The contracts cover such things as wages and hours of employment. Inasmuch as there is no evidence that contradicts Elder's testimony concerning the Union's labor organization status, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operation

Respondent is a non-profit organization that is engaged in citizen outreach, community outreach fundraising, and campaign support efforts for various organizations such as Environment America, United States Public Interest Research Group (PIRG), and affiliated state organizations. In its outreach efforts, Respondent raises awareness for a variety of issues ranging from environmental issues to public interest issues. Respondent's fundraising and outreach callers urge individuals to talk with their legislators and to get involved in activities in support of the non-profit organizations. The instant case involves the Portland call center for Respondent's Telephone Outreach Project (TOP), a program in which employees identified as "callers" call the members or contacts of various organizations to solicit their contribution of money and support for the organization.

At the national level, TOP is managed by National Director Patrick Wood (Wood). Respondent maintains a TOP center in Boston, Massachusetts; Sacramento, California; and Portland, Oregon. A director and two assistant directors manage the Portland call center. In November 2012, Referd Raley (Raley) served as the TOP director for Respondent's Portland, Oregon facility and Kate Fielding (Fielding) and Amanda Gutzwiller served as the assistant directors for that facility.

1. The duties of the callers and the directors

In performing their job as callers, the employees sit before computer screens using headsets. Using the computer screen, the employee is prompted to a particular campaign and then to donors who have previously supported a particular campaign. The computer also prompts the caller to the particular "rap" or

message that the organization wants delivered to the solicited individuals. The employee can scroll through the rap as he or she continues the conversation with the potential donor. Fielding acknowledged that there are occasions when it is acceptable for a caller to deviate from the required script or "rap." She explained that such deviations may occur when the members interrupt the caller or ask questions. The callers are encouraged to bring the conversation back to the prescribed "rap" once the questions or interruptions have been addressed. Respondent asserts that there are specific portions of the rap that cannot be eliminated during a call. During the call, the caller is expected to accurately describe to the member the campaign for which he or she is calling and to fully and honestly answer any question posed by the member to the best ability of the caller. If a member agrees to donate to the campaign, the caller is expected to confirm the member's address, confirm the amount of the pledge, and confirm a definitive return date for the donation. Vernon Wauklyn has been a caller with Respondent since 2011. He testified that while there are vital points in the structure of the rap, these points are not absolutely required to be read for each call in order to successfully complete the call.

When the caller completes a call with a member, the caller uses the computer to log the disposition or result of the call. Typically, the caller will record whether the member agreed to make a donation or whether the member responded by telling the caller that they would not donate or did not want to be called back. When members agree to donate, but do not confirm with credit card information, the caller is expected to "tripe confirm;" a technique in which the caller confirms the amount of the pledge, the address for the member, and the approximate date on which the donation will be returned. In order to keep track of the pledges received during a shift, the callers will maintain their own lists or "tick sheets" to record the pledges that were made, the last name of the person with whom they spoke, and the amount of the pledge. On an average, caller's make over 100 calls during a 4-hour shift.

During the course of a shift, the directors in charge periodically monitor the callers' conversations with members or contacts. The callers' conversations are not electronically recorded. The directors, however, often record their observations of callers and the results of their meetings with callers in an online data base called, "Upper Cut." By recording their notes, in Upper Cut, directors are able to communicate their experiences with a particular caller for the benefit of other directors. During a given shift, the directors are also responsible for addressing whatever issues arise on the floor. These actions may include answering the callers' questions about the various campaigns or assisting callers with their calling skills. The directors are also responsible for making sure that the computer system is running properly and that the callers have the necessary telephone numbers for their calls.

2. Production standards for the callers

Callers are expected to meet a minimum number of pledges on a weekly basis. If a caller fails to meet the minimum number or quota, the caller is placed on "ultimatum" status and will be discharged if he or she fails to meet the quota the following week. Callers are also evaluated with respect to the return rate or the amount of the pledged money that is actually donated in response to the initial calls. The employees' pay rates are also based on the employees' return rates. Respondent additionally utilizes a number of incentive programs that can increase employees' pay.

Respondent maintains a performance evaluation history for all callers. The history reflects the hours, total number of pledges, and the quota for specific periods of time. The history also reflects the amount of pledges actually returned, the amount of pledges required for the standard for the evaluation period, and the percentage of the standard attained by the caller. Callers are evaluated after 20 shifts, or about every 80 hours. The evaluation is used in determining the caller's rate of pay.

B. Employees' Organizing Activities

In or about October 11 and 12, 2011, a majority of Respondent's callers and administrative assistants at Respondent's Portland, Oregon facility voted to be represented by the Union. A certification of Representative issued on October 20, 2011 certifying the Union as the collective-bargaining representative for eligible full-time and regular part-time employees working in Respondent's Telephone Outreach Project in its Portland, Oregon office. Although the Respondent and the Union began bargaining for a collective-bargaining agreement on November 8, 2011, no agreement had been reached as of the date of the hearing in this matter. Employees Cortina Robinson, David Neel, Mike Schultz, and Kris Humbird were the original members of the Union's negotiating committee, as well as the Union's original stewards. Elder testified that over the course of the bargaining, Respondent has terminated all of these individuals.

C. David Neel's Work History and Organizational Activity

David Neel (Neel) began working for Respondent in the spring of 2011. At the time of his discharge on November 6, 2012, Neel worked a 4-hour shift Monday through Friday. He reported to Director Referd Raley and Assistant Directors Amanda Gutzwiller and Kate Fielding.

D. Neel's Support for the Union Before the Election

In describing his activities in support of the Union before and after the election, Neel testified concerning several conversations that he had with Raley. No one else was purported to be present during those conversations. As Raley did not testify, Neel's testimony is not rebutted.

Approximately 2 weeks prior to the October 2011 election, Neel spoke with Raley in a side office adjacent to the main calling floor. Neel recalled that Raley told him that he should vote his conscience and do what he felt was right. Raley added that he felt that the Union would ruin the relationship between the employees and Respondent and that it would keep Respondent from listening to the employees. In responding to Raley, Neel explained "the reason that we formed a union" was because management didn't listen to employees at all. Neel volunteered that he was a definite "yes" vote.

Neel also recalled an additional conversation with Raley about the Union that occurred approximately a week before the election. During the conversation that occurred during an em-

ployee pizza night at a restaurant, Raley repeated that his father had told him "If you have a bad job, you unionize, but if you have a good job, you just work real hard." Neel gave Raley a ride home from the restaurant and during the ride Raley described additional conversations that he had with his father about the Union. Neel recalled that Raley added that with the help of his father, he was going to be able to break the Union. Neel testified that he then asserted "I'm a yes vote. I already told you I'm a yes vote. Are you sure you really want to say this to me?" Raley responded that it was a private conversation and added nothing further.

E. Neel's Union Activities Following the Election

After the Union won the election, Neel was elected to the Union's negotiating committee and elected as a union steward. Even after the Union won the election, employees wore red union shirts or displayed other red items in support for the Union. Neel testified that he brought red teddy bears with union buttons attached to work and gave them to employees to display on their desks. In March 2012, Neel began bringing a 5-foot stuffed toy alligator to work on Thursdays. The alligator was named the "ultimatum alligator" and was a part of the employee's silent protest of the ultimatum policy utilized by Respondent. Neel testified that the issuance of an ultimatum was the employee's last warning to reach his or her quota. If an employee did not reach his or her quota for the week, the employee was placed on ultimatum. If the employee failed to reach the required quota the next week, the employee would be terminated. When Raley asked Neel about the stuffed alligator, Neel told him that it was meant to be a silent protest. Raley told Neel that if he left the alligator in the office, Raley would get rid of it. Neel took the alligator home with him at the end of each shift.

Although Neel did not identify a date or the surrounding circumstances, Neel testified that Raley made the statement to him that he (Raley) did not respect what the employees were doing and that they were doing it all wrong. Raley allegedly told Neel "You're leading this rabble."

When employee Ben Woodhouse was terminated in on June 14, 2012, Neel led the employees in a walkout to protest the termination. Neel testified that it was Raley's custom to make announcements to employees at the beginning of the shift. On June 14, Raley made his usual announcements and then told employees to log into the campaign on which they were working that day. Neel testified that he stood and announced to Raley that the employees were not going to log in as they were protesting Woodhouse's "unfair firing." Raley told the employees that it was their legal right to do so, however, if they wanted to do it, they had to leave the floor.

Approximately 2 weeks later, Cortina Robinson was terminated. The following day, the employees again walked out at the beginning of their shift. As he had done during the first walkout, Neel stood at the end of the shift announcements and announced the walkout. Neel recalled that he told Raley that the employees were protesting the stalled negotiations because Raley had been forced to fire an employee that he knew that he should not fire. Neel recalled that he told Raley that they were not protesting him, but were protesting the broken policy that had not been resolved in negotiations. Although Neel left the building with the other employees, he later returned to the building to speak with Raley. He had intended to ask Raley to tell National Director Wood that the Union wanted negotiations the next month. Raley interrupted his request by simply stating "Log the fuck in, or get the fuck out." Neel left.

F. Events of November 2, 2012

On the evening of November 2, 2012, some of Respondent's employees attended a party at the home of Union President Marilyn Elder. Neel offered to drive employees James Dixon and Hilari Price home from the party. Dixon testified that when he accepted Neel's offer, he had not realized that Neel had also offered a ride home to employee Chelsea Callahan. Dixon testified that he had been very angry with Callahan because he believed that Callahan and her roommate Referd Raley were responsible for spreading rumors of a sexual nature about Price. After discovering that Callahan was in the back seat, Dixon proceeded to yell at Callahan, telling her that he could not believe what she had done to Price; making such accusations and supporting Raley in his accusations. Price also began yelling at Callahan and reiterated Dixon's same sentiments. Dixon recalled that during the conversation, Price told Callahan that she had already filed a lawsuit naming both Raley and Callahan and that Raley should begin looking for a new job. Neel recalled that Price said that she intended to file a sexual harassment hostile work environment charge with the Bureau of Labor Industries.

Neel testified that Callahan turned to him and asked for his help. He recalled that he told her that he couldn't defend her because she had made those same accusations to him; telling him that Price and Raley had a sexual relationship. Neel recalled that he had added that it was all Raley's fault and that he (Raley) was a sexual predator. Neel testified that he told Callahan that Raley had slept with three women in the office who were his subordinates. Neel recalled that he told her that he would make sure that the Union did everything it could to cost Raley his job.

Dixon recalled that Neel told Callahan that he couldn't understand why she would protect Raley at Price's expense because Raley was "a piece of shit and sexual predator." Dixon did not mention in his testimony that Neel said anything about the Union causing Raley to lose his job. Dixon testified that for the remainder of the drive, Neel, Price, and he took turns yelling at Callahan about their various grievances.

Employee Vernon Wauklyn attended the party at Elder's home as well. Around midnight and after leaving the party, Wauklyn received a telephone call from Raley. Although he didn't answer Raley's call, he sent Raley a text message asking what was going on. Raley responded that he was just checking in with him. After Wauklyn arrived home, he contacted Neel because he thought that it had been unusual that Raley had telephoned him. Neel told Wauklyn about the argument in his car on the ride home from the party. Because Wauklyn understood that Callahan had been upset and because he was Callahan's friend, Wauklyn told Neel that he wanted to personally check on Callahan. When Wauklyn arrived at Callahan and Raley's home, he found that Assistant Director Fielding was

present in the home as well. Wauklyn testified that he had not been surprised to see Fielding because she was often at their home. He added that Raley and Callahan have "lots of people who hang out" at their place. Wauklyn said when he spoke with Callahan, Fielding and Raley had been sitting close enough to overhear their conversation. Callahan told him that there was a lawsuit against Raley and that she was being dragged into it. Callahan told Wauklyn that Neel had not defended her and that he had called Raley a sexual predator and that Price and Neel had said that Raley was going to lose his job over the situation. The only statement that Wauklyn heard from either Fielding or Raley was Raley's comment that the situation was ridiculous. Raley did not testify and Fielding did not address the events of November 2, 2012 in her testimony.

Although Wauklyn described Neel as the 'flaming tip of the spear for the Union," he acknowledged that when Callahan described her conversation with Neel, Dixon, and Price, she did not mention the Union. She had only talked about Neel, Dixon, and Price.

G. The Events of November 4, 2012

1. Neel's description of his November 4 shift

Although Neel normally worked only Monday through Friday, he worked on Sunday, November 4 to make up for a shift that he had missed the week before. When Neel arrived, he saw Raley standing outside smoking. Neel testified that while he and Raley were not friendly, they always engaged in small talk. When Neel went over to smoke in the same area, Raley put out his cigarette and left. Raley left shortly after the shift began and Kate Fielding was the director who was responsible for the remainder of the shift.

Neel recalled that he checked his production numbers at the beginning of the shift and discovered that he was 136 percent above the standard for the week. Neel testified that during the shift he was able to get a $200 credit card donation; something that did not happen every day. Otherwise, there were no other calls that day that stood out in his mind as significant. Neel testified that he had followed the raps as closely as he had been advised to do so by his directors.

2. Respondent's description of Neel's November 4 shift

As is the practice in all three of Respondent's TOP facilities, the Portland facility directors regularly monitor the callers during the course of a shift. Fielding testified that she began listening to Neel's conversation on November 4 because he was on an extensive call at the time of a scheduled break and she wanted to determine where he was in the course of the call. She testified that after she began monitoring the call she heard Neel fail to get a commitment from the member to pledge by a specific date and he also failed to triple confirm the member's pledge. She asserted that this was not consistent with Respondent's policy on closing a call. Fielding asserted that because of these violations, she continued to monitor Neel's conversations for the remainder of his shift.

She recalled that Neel veered from the rap on a couple of instances that concerned her. She recalled that in one instance Neel was working on a campaign that involved offshore tax savings and corporate tax loopholes. Fielding testified that during the course of the conversation, Neel made the comment that the corporate tax loopholes were used by the "big boys" and that the people running for president used them all the time. Fielding explained that the campaign in question was conducted for a PIRG group that was non-partisan and who was not involved with electoral groups. Fielding testified that Neel's reference to a political candidate using tax savings was not a part of the approved rap for that campaign. She asserted that the PIRG group did not support particular candidates and Neel's comment would not have been consistent with their political view. She admitted, however, that Neel did not mention any presidential candidate by name or take a position on any presidential candidate during the call. She also admitted that she did not recall what the member said to Neel during the call.

Fielding also recalled that Neel talked with another member about the distinction between 501(c)(3) and 501(c)(4) nonprofit organizations under the Internal Revenue Code. As Respondent engages in lobbying, it is considered a 501(c)(4) organization and donations to Respondent are not tax deductible. Fielding testified that she heard Neel tell a member that the member should not give large sums of money to 501(c)(4) 4 organizations and should give only the bare minimum.

Fielding also recalled that Neel had marked two calls as "call back" when they should have been marked as "no." She further recalled that in another instance, Neel marked a call as a $50-donation without the required triple confirmation. She asserted that during the 2 hours remaining in Neel's shift, she continued to monitor his calls. She asserted that over the course of these 2 hours she heard Neel violate eight of Respondent's policies. She acknowledges that at no time did she intervene or interrupt any of the calls that he made during these 2 hours. She also testified that at some point during the 2 hours, she reviewed the notes in Upper Cut concerning Neel as recorded by other directors.

H. Neel's Termination

1. Neel's testimony concerning his termination

Neel did not go to work on Monday, November 5, as he stayed home with his sick child. As he was traveling to work on November 6, he received a telephone call from Raley informing him that he was terminated. When Neel asked why he was being terminated, Raley explained that it was for cheating. Neel recalled that he laughed and told Raley that there was no way that he could have cheated because of the return rate that he had maintained. Neel told Raley that he was going to come into the office to get his belongings, however, Raley told him that he was not allowed on the floor. Neel asserted to Raley that this must be a change in policy because Raley always let terminated employees get their belongings. Raley told Neel that he would overnight his belongings to him.

Fielding testified that she was present during Raley's telephone call to Neel. She took notes of the part of the conversation that she could overhear. She sent an email to National Director Wood on November 6 confirming the statements that Raley made during his telephone call to Neel. Fielding recorded that Raley told Neel that he was terminated for mismarking

six calls during the November 4 shift. Fielding's email to Wood on November 6, 2012 reflects that Raley gave Neel no other reasons for his discharge other than Neel's having mismarked the six calls.

2. Respondent's asserted reasons for terminating Neel

National Director Wood testified that he made the decision to terminate Neel based on Neel's conduct on November 4, as well as on Neel's history of previous violations. Respondent introduced an email that Fielding sent to Wood on November 5 at 12:36 a.m. In the email, Fielding described what she had heard when she monitored Neel's conversations on November 4, 2012. She told Wood that in the initial conversation that she had monitored, Neel had put through a pledge as "yes," however he had not used the triple commitment. She stated that when she had continued to monitor Neel, she had heard him vary from his rap including his reference to a political candidate using offshore tax havens and his comments about what to donate to 501(c)(4) charities. She also listed two other examples of how Neel had marked two "no's" as callbacks and his failure to get triple commitments with other members. She concluded the email by pointing out that there were directors' notes in the online personnel files concerning previous incidents when he had failed to correctly record responses. The email lists a reference to four incidents over the course of Neel's employment when directors spoke with Neel concerning something that was said during a monitored call or concerning his failure to correctly document a conversation with a member. The email also referenced Neel's having received an ultimatum in November 2011 for not properly using the rap and triple confirmation for the pledges. Wood testified that he relied entirely on the representations of Fielding and Raley in determining that Neel violated Respondent's polices on November 4.

3. Neel's explanation concerning his conduct on November 4

Neel testified that after he received the ultimatum in November 2011 for failing to use triple confirming, he had been "religious" about triple confirming. He also explained that because he was very active in the Union, he felt that he had a target on his back and he was concerned that he could be fired for "pretty much anything." He testified that by November 4, he had already seen Kris Humbird and Cortina Robinson fired after they became active in the Union. He asserted that for that reason he included triple confirming as a part of every call. Neel also testified that if he had marked a pledge as a "Yes, " and the member submitted no donation, his doing so would have ultimately affected his return rate and his pay. Neel denied suggesting to a member that he could only donate the $25-minimum donation. He explained that because his pay was based on the amount of money pledged and returned, he would have affected his pay in doing so. Neel also explained that it was his practice to mark calls as having dispositions of "do not call" or "no" rather than "call back" when members gave responses indicating that they did not wish to be called or were not interested in contributing. Neel acknowledged that he did not recall referring to a presidential candidate while speaking to a member about the offshore tax havens.

When Neel began working for Respondent as a caller in the spring of 2011, his rate of pay was $8.50 an hour. At the time of his termination, he received $14.50 an hour; the highest pay rate for callers at Respondent's facility. Neel had consistently maintained this rate of pay since January 2012. Neel testified that he had never failed to meet his weekly quota at any time during his employment and his return rate never fell below the standard set by Respondent. Neel testified that he had regularly been a member of the "Forty Four Club;" an incentive program that recognized callers who received 40 percent above Respondent's quota for pledges and 40 percent above Respondent's standard for giving on credit cards. Neel estimated that he had been a member of the program for its entire duration with the exception of possibly twice. Although the program ended in August 2012, Neel had been a member the last month that it functioned. Respondent also has a program in which it recognizes employees as "activists" for a specific week. The employees are selected for the distinction by the directors. Before his termination, Neel had been recognized as an activist three or four times and as recently as the week before his termination. During Neel's last pay period and the period in which he was terminated, he worked only 25.1 hours. His quota for pledges was $1162. His total pledges, however, were $1486 and 28 percent above Respondent's standard. The standard for return of the pledges for him for this period was $617. He received a return of 1,056; 71 percent above the standard return rate. In the pay period prior to his termination, Neel worked 96.1 hours and raised $7835 in pledges. The quota for pledges for this period was only $4454 which resulted in his raising 76 percent above the quota. The quota for his return rate for this period was $2488 and his actual return rate for the period was $5455. His percentage of return above the quota was determined to be 119 percent.

I. Analysis and Discussion

Because the Respondent's motive is an integral factor in determining the lawfulness of Neel's discharge, it is necessary to use what has come to be known as a *Wright Line*[2] analysis. The *Wright Line* analysis is based on the legal principle that an employer's motivation must be established as a precondition to finding an 8(a)(3) violation. *American Gardens Management Co.,* 338 NLRB 644, 645 (2002). In its decision in *Wright Line*, the Board stated that it would first require the General Counsel to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line* above at 1089.

Under *Wright Line,* the General Counsel must establish certain elements by a preponderance of the evidence. The General Counsel must show the existence of activity protected by the Act and that the Respondent was aware that the employee had engaged in such protected activity. In addition to showing that the employee in question suffered an adverse employment action, there must be some showing that the employer bore animus toward the employee's protected activity. *Praxair Distri-*

[2] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

bution, 357 NLRB No. 91, slip op at 1 fn. 2 (2011); *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). Specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. *North Hills Office Services*, 346 NLRB 1099, 1100 (2006). In effect, proving the established elements of the *Wright Line* analysis creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996) enfd. 127 F.3d 34 (5th Cir. 1997). If the evidence establishes that the reasons given for the discipline are pretextual, either in that they are false or not relied on, the employer has failed to show that it would have taken the same action absent the protected conduct, and there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp*., 340 NLRB 382 (2003); *Limestone Apparel Corp*., 255 NLRB 722 (1981) enfd. 705 F.2d 799 (6th Cir. 1982). Furthermore, an employer cannot carry its *Wright Line* burden by showing that it had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct. *Centre Property Management,* 277 NLRB 1376 (1985) enfd. in part, denied in part 807 F.2d 1264 (5th Cir. 1987); *Roure Bertrand Dupont,* 271 NLRB 443 (1984).

1. Whether the General Counsel has met the requisite burden under *Wright Line*

(a) Neel's protected activity and Respondent's knowledge

Counsel for the General Counsel urges that Neel engaged in protected activities through his outspoken support for the Union, as well as by his complaints that Raley spread false rumors about Price and by his complaints that Raley was sleeping with subordinates. The General Counsel also relies on Neel's alleged statement on November 2, 2012 that he would make sure the Union did everything it could to cost Raley his job.

Respondent acknowledges in its posthearing brief that Neel's protected activities included acting as a bargaining unit representative during the collective-bargaining negotiations, as well as by serving as a union steward. Respondent also recognizes that Neel brought the stuffed alligator to work to protest against working conditions that he believed were unfair and that he wore red clothing to demonstrate his support for the Union. Respondent concedes that Neel called for work stoppages to protest terminations on two occasions and personally took part in both of those work stoppages. In fact, Respondent concedes in its posthearing brief that Neel engaged in certain protected union and concerted activities and that Respondent knew that Neel had done so.

(b) Whether Respondent harbored animus toward Neel for his protected activity

Respondent contends that the General Counsel has failed to produce any evidence that it has demonstrated antiunion animus. Respondent points out that there is nothing to show that employees were disciplined for participating in the work stoppages or other protected activity. Respondent further asserts that the General Counsel presented no evidence of antiunion animus by Wood, Fielding, or any other present or former director, with the exception of Raley. Respondent submits that statements attributed to Raley presented in prior unfair labor practice charges are not of consequence because they are inconsistent with Respondent's stated policies or with other record evidence. Furthermore, Respondent adds that the December 2012 Board settlement of two unfair labor practice charges nullifies those allegations related to Raley by virtue of the nonadmissions clause in the settlement agreement.

Respondent acknowledges, however, that there was testimony given in the instant case concerning anti-Union statements made by Raley. Specifically, Neel testified concerning several conversations with Raley concerning the Union. Neel alleged that in one conversation, Raley told him that he was going to work with his father, a former union member, to "break the union." Neel also testified that Raley told him that he did not respect what the employees were doing and that they were doing it all wrong. Raley allegedly added "You're leading this rabble." Raley was not presented as a witness during this trial and Neel's testimony concerning Raley's statements stands without contradiction or rebuttal.

Respondent asserts that even if all of the allegations regarding statements by Raley are accurate, taken together they do not constitute a preponderance of evidence that Neel's termination was motivated by anything other than his violations of Respondent' policies. Respondent is correct in that there is no evidence that Wood, Fielding, or any other supervisor engaged in comments similar to Raley. The record reflects, however, that Raley was the highest ranking supervisor at the Portland facility at the time of Neel's termination and Respondent admits that Raley was a supervisor and an agent of the Respondent within the meaning of Section 2(11) and (13) of the Act. In a November 6, 2012 email to Wood, Raley boasted that firing Neel was one of the best staff management decisions that he had ever made. Thus, Raley played a very central role in the decision to terminate Neel. Furthermore, there is no evidence that Wood or any other supervisory official disavowed Raley's statements to Neel concerning his animus toward the employees' union organizing. Accordingly, Raley's statements cannot be isolated from Respondent and may appropriately be attributed to Respondent as evidence of Respondent's animus.

Aside from the issue of Raley's statements, I note that animus need not be proven by direct evidence; it can be inferred from the record as a whole or from indirect or circumstantial evidence. *Fluor Daniel, Inc*., 304 NLRB 970 (1991) enfd. 976 F.2d 744 (11th Cir. 1992), rehearing denied 980 F.2d 1449 (1992). In fact, indirect evidence may be the only way in which motivation can be proven since an employer will rarely, if ever, openly acknowledge that it took an adverse action against an employee because of an unlawful reason. *Sahara Las Vegas Corp*. 284 NLRB 337, 347 (1987), enfd. 886 F.2d 1320 (9th Cir. 1989). Inferring animus from the total circumstances may be based on such factors as disparate treatment of the alleged discriminate, *Holiday Inn East*, 281 NLRB 573, 575 (1986) or the timing of the employment action in relation to the protected activity. *Taylor & Gaskin, Inc*., 277 NLRB 563, 563

fn. 2 (1985). The employer's failure to adequately investigate the alleged misconduct may also be a factor in inferring animus. *New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471 (1998), enfd. 201 F.3d 592 (5th Cir. 2000).

Counsel for the General Counsel submits that Respondent's unlawful motivation in terminating Neel is established by the timing of Fielding's monitoring of Neel, Respondent's departure from past practice in monitoring and discharging Neel, Respondent's shifting rationales for monitoring and discharging Neel, and Respondent's unexplained failure to call Raley as a witness. In presenting her case in chief, the counsel for the General Counsel placed a great deal of emphasis on the fact that Neel was monitored and terminated only days after he criticized Raley to Dixon, Price, and Callahan as they drove home from the party on November 2. Quite frankly, I am not persuaded that this conversation has the degree of significance as claimed by the General Counsel. First of all, the significance of Neel's alleged statements concerning Raley occurred after a party at the union representative's home. It is undisputed that employee Callahan who also lived with Director Raley, attended the party. Although neither Raley nor Callahan testified, the record indicates that they were certainly more than casual friends. Thus, Neel's alleged comments to Callahan were made after she attended the very same party that Neel attended. Thus, there is no evidence that Neel was attending a secretive gathering of union supporters for which they attempted to hide their involvement from Director Raley or other management representatives. More significantly, however, is the fact that Neel's testimony concerning his alleged statements about Raley, were not corroborated. Dixon testified concerning what Neel said to the employees on their ride home on November 2. According to Dixon, Price told Callahan that she had filed a lawsuit that named both Raley and Callahan and that Raley "had better start looking for a new job," Dixon did not testify that Neel said anything about his intent "to make sure that the Union did everything it could to cost Raley his job" as alleged by Neel in his testimony. Dixon recalled only that Neel told Callahan that he could not believe that she would protect Raley at Price's expense because he was a "piece of shit" and sexual predator." In fact, Dixon gave no testimony that the Union was ever mentioned during this conversation.

Counsel for the General Counsel also presented employee Wauklyn to confirm that on that same evening he had discussed this same conversation with Callahan in Raley's and Fielding's presence. Wauklyn testified that when he went to Raley's and Callahan's home, he asked Callahan about the conversation in Neel's car. Wauklyn described Callahan as being "super upset" about the statements made by Price and Dixon. Wauklyn recalled that Callahan had also been upset with Neel because he had not defended her against Price and that there had been some comments about a lawsuit being filed against Raley concerning rumors. Wauklyn recalled that Callahan told him that Neel had called Raley a sexual predator and that Price and Neel had said that Raley was going to lose his job. Wauklyn was specifically asked if Callahan mentioned anything about the Union during this conversation. Wauklyn testified "She didn't specifically bring up the union. She just mentioned David and Hilari and James." Thus, while Raley and Fielding may have learned that Neel had made disparaging statements about Raley, there is no evidence to corroborate that Neel had threatened to involve the Union in causing Raley to lose his job or that such a threat was communicated to Raley and Fielding. Accordingly, I don't find that the timing of Neel's termination in relation to Neel's November 2 comments to be the pivotal factor as viewed by the General Counsel.

While I do not credit Neel's testimony about the alleged threat to involve the Union in causing Raley to lose his job, there is no question that Neel was a central figure in maintaining the employees' support for the Union. There is no dispute that Neel was actively involved in energizing the employees; whether by use of the stuffed alligator or by leading the employees in the protest walk-outs. I credit Neel's unrebutted testimony with respect to Raley's alleged statements concerning the Union. Crediting those statements, I also find that it is plausible that Raley viewed Neel as a motivating force in the Union's support among the employees and that Raley harbored animosity toward Neel for this influence.

In consideration of the various factors that have been used as a foundation for inferring animus, I find that Respondent's deviation from past practice and its disparate treatment of Neel to be significantly more germane. Wauklyn has worked for Respondent since November 2011. He was a friend of Raley's prior to his employment and he began working for Respondent after Raley's unsolicited job offer. Wauklyn testified that when has said something during a call that management did not want him to say, a manager has come to him, tapped him on the shoulder, and then conducted what Wauklyn described as a "check-in." The record is not clear as to the specific definition of a "check-in," however, Fielding confirmed that a part of a director's job is to conduct check-in's with callers. Based on the overall testimony, it appears that a check-in occurs generally when a director intervenes or "checks-in" with a caller concerning some aspect of the caller's interaction with a member. Wauklyn recalled a specific time in the spring of 2012 when he failed to triple confirm a pledge with a member. Raley came to Wauklyn immediately after he finished the call, inquired about the call, and took Wauklyn in for a check-up. Wauklyn also testified that there had been other occasions when he was pulled off the phone by managers for a check-in, evaluation, or training. Wauklyn also testified that approximately two months before the trial, he had been immediately pulled off the phone by Director Amanda Gutzwiller because he said an inappropriate word after a call. Wauklyn also recalled having seen five other employees being called off the phone by directors. He estimated that callers get called off the phone fairly frequently for something that happens during a call.

Fielding maintains that after she first began monitoring Neel's calls on November 4, she continued to do so for the next 2 hours and for the remainder of his shift. There is no dispute that Fielding allowed Neel to complete his full shift and that neither she nor any other supervisor said anything to him about his November 4, 2012 calls prior to his being informed of his termination. The record reflects that the Respondent's decision to terminate Neel was made without any attempt to talk with

Neel about his calls on November 4, 2012. Wood testified that although Fielding had the authority to stop a caller after hearing a mistake or violation during a call, he did not know why Fielding did not ask Neel for an explanation of his actions.

Fielding testified that during the 2 hours that she monitored Neel's calls, she overheard as many as eight violations of Respondent's calling policy. She made no attempt to stop him or to intervene in any way despite the fact that she testified that she had been concerned that his statements to members could seriously damage the Respondent's reputation of integrity and affect its relationship with its customers. Although it is the practice to address an issue with callers when a director becomes aware of a mistake or violation, Fielding made no attempt to do so with Neel.

Counsel for the General Counsel submits that Fielding gave shifting rationales for her decision to extensively monitor Neel on November 4. Fielding acknowledged that while she had the opportunity to interrupt Neel after hearing the alleged violations, she did not do so. When asked why she did not do so, she testified:

> As I stated, I found these violations pretty egregious. And once I had checked that in his notes he'd already been talked to several times about issues relating to these exact violations, it seemed pretty clear to me that Mr. Neel should not remain on staff.

She went on to add that she had not spoken with Neel because her recommendation was to terminate him and meeting with him had been a "moot point." She testified that under the circumstances, his explanation was unnecessary. In response to a series of leading questions by Respondent's counsel, Fielding later testified that she had not confronted Neel about his calls because she did not know how he would react. Although Fielding asserted that she did not pull Neel off the phones on November 4, 2012 because she was concerned about a potential confrontation with him, she also testified that she also changed the disposition of some of his calls that same shift. She explained that she had changed some of Neel's calls from a "yes" disposition to a "maybe" disposition. Although such changes would likely have been evident to Neel when he reviewed his pledge slips for the shift, Fielding did not explain why she was not concerned about provoking a confrontation with Neel for doing so. Neel testified, however, that he did not notice any such discrepancy when he reviewed his pledge slips for that shift. Fielding also contended that she had not told Neel on November 4 that she was recommending his termination because she was waiting to obtain approval from Raley and Wood. Fielding acknowledged, however, that she had the authority to pull Neel off the phone and to discharge him.

The record as a whole reflects that neither Fielding nor any other supervisor attempted to investigate Neel's alleged policy violations. Fielding contends that without any inquiry or clarification from Neel, she determined that Neel should be terminated. Fielding also acknowledged that during this same 2-hour period in which she was monitoring Neel, she also continued her normal shift responsibilities that included the supervision of at least 10 other employees. Thus while Fielding allegedly made the decision to recommend Neel's termination based on her monitoring of Neel's calls, she was performing other tasks and dealing with other responsibilities during the same timeframe. Had Neel's conduct been as egregious as Fielding asserts and inasmuch as she was not able to give the monitoring of Neel's calls her full attention, it would seem reasonable that she would have needed to do even a modicum of investigation. She did not, however. In fact, the record is undisputed that none of the directors asked Neel for any clarification concerning these allegedly "egregious" interactions.

Fielding's explanation of her monitoring of Neel's calls on November 4, 2012 was also somewhat contradictory. She testified that a caller averages approximately 100 calls per 4-hour shift. She asserted that she monitored Neel for the last 2 hours of his shift; which would have necessitated Fielding's monitoring an average of 50 calls. Rather than using the monitoring forms that are usually used by directors to monitor callers, Fielding produced only handwritten notes on a piece of scrap paper. She acknowledged that the notes were not in chronological order and she could not recall if she monitored any other callers during that same shift. She also confirmed that during the 2 hours when she was monitoring Neel, she was also handling her other responsibilities as director for that shift. Fielding testified that the responsibilities for a director included supervising all the callers on the shift, checking in with callers, monitoring callers, conducting skill sessions, answering callers' questions, addressing issues on the floor, making sure callers' pay was accurate, preparing pledge sheets, and making sure the system was up and running. On the shift in question, Fielding would have needed to exercise these responsibilities for as many as 10 others callers in addition to Neel.

Raley did not testify and there is no evidence that Raley conducted any independent investigation of the matter. The record in fact indicates that Raley's first conversation with Neel after Neel reported to work on November 4, 2012 was the telephone call to Neel to inform him of his discharge. Wood conducted no additional investigation and admits that he made the decision to terminate Neel solely on the representations made by Fielding and Raley. Interestingly, in an email dated November 6, Raley bragged to Wood that Neel's termination was one of the best staff management decisions that he [Raley] had ever made. In its decision in *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988), the Board pointed out that an employer's failure to adequately investigate an employee's alleged misconduct has been found to be an indication of discriminatory intent. The Board added that the employer's failure to investigate an employee's alleged misconduct is an important factor in determining the reason for the adverse action. Accordingly, I find that Respondent's failure to adequately investigate the alleged misconduct further supports an inference of animus. *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1996). I also find that Respondent's failure to investigate Neel's alleged infractions, as well as Fielding's incredible explanation for why and how she monitored Neel, to further support an inference of pretext.

Based on the record as a whole, I find that counsel for the General Counsel has met the requisite burden under *Wright*

Line. Furthermore, while I do not find that Neel's comments to Dixon, Price, and Callahan on the evening of November 2, 2012 to be the pivotal protected activity as asserted by the General Counsel, it is reasonable that Neel's disparagement of Raley may very well have been the proverbial last straw for Raley. Unrebutted record evidence demonstrates that even before these final remarks on November 2, Neel had already incurred Raley's animus because of his outward support for the Union. Neel's remarks about Raley on November 2 simply added one more reason for Respondent to want to get rid of Neel.

(c) Whether Respondent would have terminated Neel in the absence of his protected activity

Respondent acknowledges that if the General Counsel meets its burden under *Wright Line,* Respondent must demonstrate that it would have terminated Neel absent his protected union and concerted activities. Respondent asserts that it has done so by demonstrating that Neel's discharge was consistent with established policies and disciplinary practice. Respondent asserts that when directors discover that a caller is violating established workplace policies, they take appropriate action to ensure that callers understand how their actions violated the policies and receive appropriate training and feedback so that they can improve their overall performance and avoid further violations. Fielding testified that because Respondent wants to maintain quality staff, Respondent will meet with a caller when management first notices or witnesses a violation. The caller is warned or retrained. Respondent's counsel submits that when violations continue to occur, directors generally take progressive disciplinary action, which includes (1) verbal warning (2) ultimatum and (discharge). Although directors are authorized to proceed directly to discipline for serious or repeated violations of policies, directors are required to seek approval from Wood or the legal department for discipline for experienced callers or in those situations in which a director has reason to believe that a legal action is forthcoming.

Respondent submitted a disciplinary log to show discipline that was administered during the period of time between March 24, 2011 and July 10, 2013. Respondent asserts that over the course of this period, Respondent disciplined 127 callers, issued ultimatums to 27 callers, and terminated 6 callers for failing to triple confirm and for failing to accurately disposition calls. Respondent also asserts that during this same time period, it disciplined 17 callers, issued ultimatums to 3 callers, and terminated one employee for failing to follow the rap.

Counsel for the General Counsel submits, however, that although Respondent maintains a three- step progressive discipline procedure of retraining, placing on ultimatum, and finally discharge, Respondent's records reflect that callers other than Neel were repeatedly counseled about violations of Respondent's policies without being discharged. As an example, counsel for the General Counsel points to a caller who is identified in the records as "smso." This employee was shown to have been counseled seven times on March 11 and 18, April 12, 14, and 16, May 24 and 30, 2013 for conduct that includes failing to triple confirm pledges, recording incorrect disposition of calls, misrepresenting Respondent's ability to honor certain member requests, using profanity at the end of a call before hanging up, asking members to allow her to send pledge information so that she could get credit even though the member asked to be taken off the list, frequently not using rap responses, and conveying incorrect information to members. During one of these calls, the caller hung up on a spouse mid-sentence. The record reflects that Fielding was monitoring this particular caller on April 14, 2013, and after the caller had already been counseled for her conduct on March 11 and 18, and April 12. During the call, the caller mismarked a call as "yes" and failed to get a commitment for a specific nonconditional amount and date. Fielding met with the caller and explained to the caller that the triple confirmation and all disclaimers had to be communicated to the member in order for the caller to document the call as "yes." Fielding documented in her notes that she had made the caller aware that this is a fireable offense regardless of whether it is intentional or accidental. Fielding also documented that this was not the first time that Respondent had checked-in with the caller about this issue. Two days later, Director Gutzwiller documented that she heard the caller use profanity at the end of a call and the caller was counseled that such behavior was not acceptable. Fielding again monitored this caller on May 24, 2013. During the call, the member asked to be taken off the calling list. The caller asked the member if she could send a pledge with her name on it in order that the caller could get credit for the pledge; then agreeing that she would then take the member off the calling list. Fielding also documented that the caller was frequently not utilizing the rap responses. Respondent's record indicates that Fielding met with this same caller on May 30 for an evaluation. Fielding noted what she had discussed with this caller during the evaluation and noted that there had been several issues with her calling style and what she was communicating to members. Fielding reminded the caller that the caller had been placed on ultimatum because she had not upheld the integrity of the organization and respected the members by being clear and honest with them in terms of what they were committing. Fielding reiterated that the caller must follow the rap. Fielding documented that the caller was aware that because of the ultimatum, she could be fired if she continued to use misleading communication in terms of attaining commitments and/or closing the call in a manner that is not clear and honest or does not uphold the integrity of the organization. Despite the ultimatum and the continued counseling with this caller, there is nothing to indicate that this caller was terminated.

Counsel for the General Counsel also relies on the discipline records concerning a caller identified as "sada." The records indicate that this employee was counseled five times, on October 17 and December 12, 2012, and March 13 and 26, and May 28, 2013, for conduct including recording incorrect dispositions for calls, failing to be honest and direct with members, failing to correctly confirm a pledge, and repeatedly marking calls with members as answering machines. I note that on October 17, 2012, Director Gutzwiller told this caller that incorrectly dispositioning calls was a fireable offense and the caller was told "Don't do it again." On December 12, 2012, however, Fielding documented that three members had told the caller

"no" and he had marked the calls as "call backs." Respondent's record reflects that Director Gutzwiller documented additional issues with this caller for calls monitored on March 13 and 26. On May 28, 2013, Gutzwiller noted that the caller had marked nine calls as "answering machine" when he had actually had live calls. She documented that this had not been the first time that he had been counseled about doing this and he should consider it a formal warning. There was no indication, however, that the caller was placed on ultimatum or terminated.

Counsel for the General Counsel also submits that the Respondent's records indicate that there are 11 other employees who have been counseled at least three times and have not been discharged.

Accordingly, it would appear that while Respondent has a practice of counseling and even terminating employees for their performance, the records also reflect that there is no discernible consistency in Respondent's doing so. In comparing Neel's conduct to the conduct described in Respondent's discipline log, there is no clear distinction in Neel's conduct as compared to other employees who were repeatedly counseled and yet not discharged. An employer cannot rebut the General Counsel's prima facie case by simply presenting that it had a legitimate reason for an employee's discipline or discharge. The respondent must persuade by a preponderance of the evidence that the same action would have taken place even if the absence of the protected conduct. *Roure Bertrand Dupont, Inc*., 271 NLRB 443, 443 (1984).

Respondent asserts that Fielding did not pull Neel off the phones on November 4, 2012 because she discovered that he was already on ultimatum, and because of the number of the number and severity of the violations, she expected that he would be terminated and therefore there was no need to intervene or to train Neel. Respondent's records, however, indicate that Respondent has continued to counsel with other employees and to tolerate their continued violations without terminating their employment. Accordingly, I find that Respondent has not met its burden in demonstrating that Neel would have been terminated in the absence of his protected activity. Additionally, the total record evidence supports a finding that Respondent's stated reason for terminating Neel is pretextual. According, I find that Respondent unlawfully terminated Neel on November 6, 2012 because he engaged in protected activity.

J. Neel's Entitlement to Reinstatement and Backpay

Respondent submits that even if it is found to have violated the Act, reinstatement and backpay are inappropriate remedies because Neel's conduct provided independently sufficient grounds for termination. Respondent asserts two separate reasons in support of this argument. There is no dispute that following Neel's discharge, Neel participated in a newspaper interview and he made a negative statement about Respondent in the course of the interview. Additionally, Respondent discovered after Neel's discharge that he was previously convicted and incarcerated. Respondent asserts that had the directors learned of this criminal history when Neel applied for work, he would not have been hired and if Respondent had learned of the history during his employment, Neel would have been terminated.

Accordingly, Respondent asserts that even if an employer is found to have violated Section 8(a)(3) by terminating an employee, an administrative law judge has the discretion to find that no remedy is required. In support of this argument, Respondent cites the Board's decision in *American Navigation Co*., 268 NLRB 426, 427 (1983); a case dealing with the issue of whether a discriminatee was entitled to backpay in a compliance proceeding. Because the discriminatee concealed some of his earnings during the backpay period, the judge adjudicating the compliance proceeding adjusted the backpay for which he would otherwise have been entitled. In reviewing the judge's supplemental decision, the Board found that the total backpay amount should be adjusted to a greater extent than was found by the judge. Thus, the issue in question was not whether backpay was denied or reduced in the initial hearing on the merits, but whether the discriminatee's concealment of earnings during the backpay period would diminish or affect the backpay remedy during the compliance stage of the proceeding.

The Respondent also relies on the Board's decision in *Axelson, Inc*., 285 NLRB 862, 865–866 (1987); a case involving reinstatement and backpay rights where the alleged discriminatees engaged in strike misconduct. The Board found that backpay will not be automatically barred for the misconduct, but the Board would limit backpay rights by cutting them off at the time the employer acquired knowledge of the misconduct if it is otherwise shown that the conduct is such that it has not been tolerated in the past. *Axelson* at 866.

The Respondent also cites the Board's decision in *John Cuneo, Inc*., 298 NLRB 856, 856 (1990), in its argument that backpay and reinstatement have been found to be inappropriate remedies when the employer can show that an employee's misconduct would have otherwise resulted in termination. This case involved a compliance proceeding in which the judge and the Board ordered reinstatement and backpay to six discriminatees in the underlying and initial proceeding. In a subsequent compliance proceeding, the judge, the Board, and the United States Court of Appeals for the District of Columbia all dealt with the issue of whether an employee's deliberate misrepresentation on an employment application was sufficient to strip one of the discriminatee's status as a permanent employee when he acquired the status by virtue of the misrepresentation. After the Board's remand to the judge hearing the compliance matter, the judge reopened the record, took additional evidence. The judge found that the employee in question willfully, deliberately, and intentionally misstated his employment history on the employment application by stating that he was self-employed rather than laid off from another company. The judge found that the respondent employer had a policy of not hiring applications who misstate their employment background. Upon review of the judge's decision, the Board agreed with the judge's conclusion that the respondent would not have hired the employee had it known of his misconduct in falsifying his employment application. The Board went on to state, however, that they did not find that the misconduct automatically bars an award of backpay. The Board limited the employee's right to backpay to the date the respondent acquired knowledge of the employee's misconduct, consistent with the remedy ap-

proved by the Board in *Axelson, Inc*., the case described above concerning strike misconduct.

1. Neel's prior conviction

Respondent's counsel argues that it would not have hired Neel if Respondent had known of his prior conviction and that Respondent would have terminated him if it had learned of the conviction while he was still employed. There is no dispute that Neel was previously convicted of crimes and he served an 18-month sentence as a result of the conviction. Neel testified that in 2005, when he was 28 years old, he pled guilty to the alleged charges. He asserted that three of the convictions stemmed from an incident involving Neel and a minor, whom he mistook for an intern. The fourth conviction stemmed from an allegation made by his ex-wife, who threatened to ruin him when they separated. Neel also testified without contradiction that he was open about his past with his coworkers and that his disclosure included his telling Chelsea Callahan; Raley's roommate.

Fielding and Wood testified that Respondent had a policy concerning the employment of individuals with criminal convictions. Respondent acknowledges that the policy does not establish an absolute bar to employment of a caller with a criminal conviction and that Respondent asserts that it adopts a case-by-case approach. Under the policy, the directors are to alert the national director when they discover that an applicant has a criminal conviction. Wood testified that crimes such as those for which Neel was convicted would always disqualify a candidate or existing caller from employment. Wood testified that had he known of Neel's prior conviction, he would not have hired Neel and he would have terminated Neel if he had known of the conviction while Neel was still employed.

Neel testified without contradiction that when he applied for work with Respondent, he was never asked about any prior criminal convictions. Furthermore, during the course of his employment, he was not asked about having prior convictions. Wood admitted that Neel's employment application did not have any inquiry as to whether he had previously been convicted of a crime. Furthermore, Wood admitted that at the time of an employee's employment application, Respondent does not check public records to determine if there is a prior criminal conviction. Wood also acknowledged that Respondent does nothing to investigate an employee's criminal history during his or her employment. Additionally, Respondent's written policies do not call for the investigation of an applicant's criminal history and does not require the discharge of an employee for having a criminal history. Certainly, the written policy does not specify which, if any, particular crimes could result in discharge.

While both Fielding and Wood testified that Neel's criminal history would disqualify him from employment with Respondent, the Respondent produced no evidence to show that it ever refused to hire an applicant or that it discharged an employee because of the individual's criminal history. In consideration of the total record evidence, I don't find that there is sufficient evidence to support Respondent's assertions that Neel's criminal history would disqualify him from employment with Respondent. Although Respondent's written policy requires a director to bring an applicant's or an employee's prior criminal history to the attention of the national director, the policy specifically includes the statement that Respondent cannot have an across-the-board rule that it will "never hire or keep a person with a criminal history on staff." Although Neel's application for employment form requests information about prior work experience, colleges attended, graduation date, and the reasons why he wanted the job, there was nothing in the application concerning any prior criminal history. Accordingly, if a prior criminal conviction or if a criminal history of any kind was a matter of importance to Respondent, it is reasonable that Respondent would have addressed such history in its application form or would have placed greater emphasis and restrictions in its written policies. Furthermore, there is no evidence that a criminal history has ever been the basis for Respondent's failure to hire an applicant or a basis for terminating an existing employee. Accordingly, I don't find that Neel's prior criminal history disqualifies him from reinstatement and backpay.

2. Neel's postdischarge statement to the *Portland Mercury*

Respondent further asserts that reinstatement and backpay are not appropriate remedies in this case because of a statement that Neel made to a news reporter after his termination. On February 27, 2013, and almost four months after Neel's termination, the *Portland Mercury*, a local publication, published an article concerning Neel's termination. The article outlined the progression of the underlying charge in this matter and described other charges and allegations brought by the Union against Respondent. The reporter included references to statements given by Neel, other employees, and even Raley. At the end of the article, the reporter quotes Neel as stating that he wanted his job back, but noted that Neel also stated "I don't believe in what they do anymore . . . . It's a Ponzi scheme to get money out of progressive people." Neel testified that at the time that he made this statement to the reporter, he was very angry. He testified, however, that he did not believe that Respondent was a Ponzi scheme and that he very much believed in Respondent's mission.

Fielding testified that if Neel were still on staff at the facility, she would recommend that he be fired for making this comment because such comments were false and misleading. Wood testified that because Neel made this comment, he would not be eligible for reemployment. Wood testified that such a comment was harmful to Respondent's reputation and to Respondent's relationship with its partner organizations.

As counsel for the General Counsel points out in the posthearing brief, the Board affords discriminatees leeway in consideration of the experiences they have suffered when assessing their postdischarge comments. In its earlier decision in *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), enfd. 548 F.2d 391 (1st Cir. 1977), the Board recognized that an "evaluation of postdischarge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge."

In a more recent decision, the Board further clarified the applicable standard for evaluating whether a discriminatee's postdischarge misconduct warrants forfeiture of the right to traditional remedies of reinstatement and backpay. The stand-

ard requires the employer to prove that the alleged misconduct is so flagrant as to render the employee unfit for further service or that there is a threat to the efficiency in the plant. *Hawaii Tribune-Herald,* 356 NLRB No. 63, slip op. at 2 (2011). In that particular case, the Board found that a discriminatee was not unfit for further service although he publicly claimed that his former employer, a newspaper, failed to adequately staff its newsroom, failed to support its photographer, lacked interest in reporting everything that was happening in the community, was silent on issues of journalism and First Amendment rights, failed to mention a judicial ruling, and failed to challenge facts given by its sources.

The Board followed *Hawaii Tribune-Herald* in its more recent decision in *Connecticut Humane Society*, 358 NLRB No. 31, slip op. at 1 fn. 2 (2012). The respondent in this case was a nonprofit corporation that was engaged in the business of animal care, sheltering, and adoption. The case involved the discharge of two employees who were alleged to be supervisors by the employer and who were terminated because of their support for the union during an organizing campaign. Following their discharge, the employees posted statements on a former news reporter's website, criticizing not only the employer, but also its management representatives and members of the board of directors. The respondent employer asserted that the discharged employees had accused managers and board members of lying, misusing funds, abusing animals, corruption, and harassment. The respondent contended that these individuals could no longer function as members of a team "when they have systematically poisoned virtually all their relationships." The respondent asserted therefore that these individuals could not be reinstated because they were "unfit for further service or a threat to efficiency" in the respondent's organization. The Board affirmed the judge in finding that the respondent failed to meet its burden of proof that the postdischarge conduct of these individuals disqualified them from the Board's normal remedy of reinstatement and full backpay. In his analysis of the arguments, the judge referenced a number of prior Board decisions in which the Board had not denied reinstatement to discriminatorily discharged employees for postdischarge statements and actions that disparaged the employer. Some of those cases included *George A. Hormel & Co.,* 301 NLRB 47 (1991) (discharged employee handed out leaflet attacking employer's product and telling an employee that employer's product "can kill people"), enf. denied on other grounds 962 F.2d 1061 (D.C. Cir. 1992); *Timet,* 251 NLRB 1180, 1180 (1980) (letter distributed by employee accusing employer of providing "false testimony" at hearing before judge and accusing employer of "expressed and implied tyranny"), enfd. 671 F.2d 973 (6th Cir. 1982); *Pincus Bros*., 241 NLRB 805, 809 (1979) (discriminatee published an article in "dissident" newspaper accusing employer of being a "crook" and stealing from employees), enf. denied on other grounds 620 F.2d 367 (3d Cir. 1980); and *Golden Day Schools*, 236 NLRB 1292, 1297 (1978) (discharged employees distributed flyer to parents of students while picketing; flyer disparaged employer's service and facilities including accusing it of serving spoiled food, having water fountains with dirty water, using unsafe buses and having children sleep on dirty cots), enfd. 644 F.2d 834, 841 (9th Cir. 1981).

In the instant case, Neel's single statement about not believing in what Respondent did and his categorizing the operation as a "Ponzi scheme pales by comparison to the statements made by discharged employees in *Connecticut Humane Society* and the other Board cases referenced above. Accordingly, Respondent has not demonstrated that Neel's statement to the *Portland Mercury* after his discharge disqualifies him for reinstatement and backpay.

Respondent further contends that Neel should not be reinstated because his cynicism would prevent him from being an effective caller and would poison the calling atmosphere in general. It is reasonable that every employer faced with the ordered reinstatement of an employee would voice concerns about the employee's attitude or behavior upon his or her return to the employer's facility. In *Trustees of Boston University,* the Board addressed the realities of a discriminatee's return to a respondent's facility pursuant an order of the Board. As the judge noted in his initial decision:

> It is most likely that every Board order of reinstatement sends the employee back into the arms of a management less than receptive to the reentry. The employee has caused management representatives the expense of a lawsuit, the ignominy of being officially proclaimed violators of the law, and, in most cases, the humiliation of being publicly branded as liars. The Board does not withhold reinstatement because of the predictable disharmony which will flow from the awkward situation.

Despite this statement, however, the judge had some concerns about the discriminatee being reinstated to the same department where she had previously worked and the tension that might exist between her and her former supervisor. He recommended therefore that she be reinstated; but to another department. The Board, however, ordered that the discriminatee be reinstated to her former job, if that job still existed. The Board went on to point out that it is a significant consideration that other employees be made aware, through the discriminatee's return to his or her former job, that their rights to engage in concerted activity are protected by the Act. The Board explained that it is incumbent upon the employer, in order to comply with their Order, and the discriminatee, in order to fulfill the legitimate job requirements of the position to which he or she is to be reinstated, to attempt to work together harmoniously and forget past animosity.

Thus I find no basis to deny Neel reinstatement and backpay under the traditional remedies available to him.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Communications Workers of America, Local 7901, AFL–CIO has been a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating David Neel, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged David Neel must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Neel for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

The Respondent, The, Portland, Oregon, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for their activities in support of any labor organization or for engaging in protected activity.

(b) In like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer David Neel full and immediate reinstatement to his former job or, if that job no longer exists, to an substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the Board's Order, remove from their files any reference to the unlawful discharge, and within 3 days thereafter, notify David Neel that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including any electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(e) Compensate David Neel for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(f) Within 14 days after service by the Region, post at its Portland, Oregon facility, copies of the attached notice marked "Appendix[4]." Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative; shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. October 25, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, or otherwise discriminate against

[3] If no exceptions are files as provided by Section 102.46 of the Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board.

you for activities in support of the Communications Workers of America, Local 7901, AFL–CIO or in support of any other labor organization or for engaging other protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer David Neel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Neel whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate David Neel for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL remove from our files any reference to the unlawful discharge of David Neel, and

WE WILL notify him in writing that this has been done and the discharge will not be used against him in any way.

THE FUND FOR THE PUBLIC INTEREST